Presentation Overview

• Outline open meetings law essentials, including:
  • What constitutes a governmental body
  • When a meeting occurs
  • Meeting notice requirements
  • Open sessions v. closed sessions
  • Citizens’ roles in meetings, including participation and recording
  • Voting during meetings
  • Meeting record-keeping requirements
  • Enforcement
INTRODUCTION
Importance of Government Transparency

• “Transparency and oversight are essential to honest, ethical governance.”
  John K. Maclver Inst. for Pub. Policy, Inc. v. Erpenbach, 2014 WI App 49, ¶ 32,
  354 Wis. 2d 61, 848 N.W.2d 862

• Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98
  • The purpose of the open meetings law is to ensure openness
    • Only a few limited exemptions permit confidentiality
  • The open meetings law is to be broadly interpreted to promote openness
Public Policy

• “In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.”

—Wis. Stat. § 19.81(1)
Essentials

- Generally, the open meetings law requires that all meetings of governmental bodies:
  - must be preceded by public notice; and
  - must be publicly held in a place that is reasonably accessible and open at all times to all members of the public;
    - except in limited situations in which a closed session is specifically authorized.
GOVERNMENTAL BODIES
Governmental Body

• “‘Governmental body’ means a state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order . . . .” Wis. Stat. § 19.82(1).

• Translation:
  • Any kind of collective governmental entity (state or local level).
  • Created by constitution, statute, ordinance, rule or order.
  • Without regard to what that entity is called (i.e., a board, commission, committee, council, etc.).

• Includes purely advisory bodies, governmental corporations, quasi-governmental corporations, and formally constituted subunits

• Generally, a governmental body does not include a group of administrative staff of a government agency.
  • Highly fact-specific issue.
Governmental Bodies: Collective Entities

- Collective governmental entity
  - Must be a group of people.
    - Does not include a single, individual government official.
  - Must have a collective identity and purpose.
  - A group with a determinate membership and an expectation that it will act collectively in relation to some subject of governmental business.
  - Does not include an ad hoc gathering.
Governmental Bodies: Creation

• “[C]reated by constitution, statute ordinance, rule or order . . . .”
  • Refers not to the kind of power wielded by a governmental body, but rather to
    how the body is created.

• How to determine whether a body is created by constitution, statute, ordinance or
  rule?
  • Look it up.

• How to determine whether a body is created by order?
  • An order can include any directive—whether formal or informal—that creates a
    body and assigns it some governmental responsibilities. See 78 Op. Att’y Gen. 67
    (1989).
  • Such a directive may be issued by any governmental official or entity that has the
    power to delegate the governmental responsibilities in question.
  • Note: This is a very fact-specific standard, so there are no bright-line rules.
MEETINGS
Meeting

- “Meeting’ means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(1).
  - Not limited to face-to-face gatherings or physical presence together.
  - Examples: telephone calls, emails, virtual meetings, other electronic forms of communication
Meetings: The Showers Test


• A meeting occurs whenever:
  • Members convene for the purpose of conducting governmental business (*purpose* requirement)
  • The number of members present is sufficient to determine the body's course of action (*numbers* requirement)
    • Includes *negative quorums*
Meetings: “Purpose” Requirement

• “Conducting governmental business” is an expansive concept that is not limited to formal or final decision making.

• “Conducting governmental business” includes:
  • preliminary decisions
  • discussion
  • information gathering
  • interaction among members is not required

Meetings: “Numbers” Requirement

• This number is not necessarily equal to a majority of the membership or to a quorum of the body.

• A sufficient number of members to determine a body’s course of action can refer to either:
  • the affirmative power to pass an action or
  • the negative power to defeat an action
    • Sometimes referred to as a “negative quorum”

• Fact-specific depending on the governmental body
Meetings: “Convening” of Members

• Members must convene for there to be a meeting

• Not limited to face-to-face gatherings or physical presence together

• Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority

• If members communicate without physically gathering together, the key question is:
  • To what extent do their communications resemble a face-to-face exchange?
Meetings: “Convening” of Members (cont.)

- A “convening” of members can occur through written correspondence, telephone and video conference calls, virtual meetings, emails, and other forms of electronic messaging.

- Technology creates risk of private communication that should be held at public meetings
  - Important to keep in mind with increase in use of virtual workplace platforms

- To minimize the risk of violations, caution is advised:
  - Use only for one-way transmissions
    - Do not send replies or minimize their distribution
    - If a reply is needed, do not reply to all; reply only to the sender
  - Do not use for debate/discussion or polling/voting
    - Could be construed as a “walking quorum”
  - Limit the use of attachments/editing among members
Meetings: Serial or “Walking” Quorum

• “Walking” Quorum: A meeting resulting from a series of gatherings among body members

• Elements of a “walking” quorum:
  • A series of gatherings among groups of members
  • Each smaller in size than a quorum
  • Agreement to act uniformly
  • In sufficient number to control the body

• The “walking” quorum concept is intended to prevent circumvention of the law through the use of an agent or surrogate to obtain collective agreements of members outside a public meeting.

• Practical Tips:
  • “Walking” quorum issues are complex and fact-specific
  • Consult with your legal counsel
NOTICE
General Notice Requirement

• “Every meeting of a governmental body shall be preceded by public notice . . . .” Wis. Stat. § 19.83(1).

• Notice must be communicated to:
  • The **public**
  • News media that have filed a written request for notice
  • The **official newspaper** for the community in question
    • If none, then a news medium likely to give notice in the area

• Presiding officer is legally responsibly for ensuring notice requirements are met
  • Tasks may be delegated but presiding officer liable for any violations
Manner of Notice to the Public

• Notice to the public **must** be made using one of the following methods:
  • **Posting** in at least **3 public places** likely to give notice to persons affected
  • **Posting** in at least **1 public place** and on the body’s **Internet site**
  • **Paid publication** in news medium likely to give notice to persons affected
Timing and Content of Notice

• “Every meeting of a governmental body shall be preceded by public notice . . . .” Wis. Stat. § 19.83(1).
  • Separate notice must be given for each meeting at a time and date reasonably proximate to the meeting. Wis. Stat. § 19.84(4).

• Notice must be communicated at least 24 hours before the meeting.

• The meeting notice must reasonably inform the public of the **time**, **date**, **place**, and **subject matter** of the meeting.
Content of Public Notice: Subject Matter

• How detailed must a notice be in describing the subject matter of a meeting?
  • The Wisconsin Supreme Court has said that the description must be reasonable under all of the relevant circumstances of the particular case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.

• Relevant circumstances include:
  • The burden of providing more detail
  • The degree of public interest in the subject
  • Whether the subject is non-routine

• Notice should **not** use generic, uninformative subject-matter designations, such as:
  • Old or new business
  • Agenda revisions
  • Miscellaneous business, etc.

• Notice should include the subject matter of any contemplated closed session
OPEN SESSIONS
Open Session Requirements

• “[A]ll meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.” Wis. Stat. § 19.81(2).

• “Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times . . . .” Wis. Stat. § 19.82(3).
Open Sessions: Reasonably Accessible

- Three aspects to public accessibility:
  - **Physical location** in the community
    - Meetings should be held within the body’s geographic area
    - May not be held on private premises unless open and reasonably accessible to public
  - **Room size** and acoustics
    - Must be reasonably calculated to accommodate all citizens who wish to attend
    - Body members must take reasonable steps to make it possible to be heard
  - **Physical accessibility**
    - In open session, the room should be unlocked
    - If doors must be closed due to noise, notice should be posted inviting entry
    - Accessibility for people with disabilities
      - State bodies must meet in facilities people can access w/o assistance. Wis. Stat. § 19.82(3).
      - Statute not applicable to local bodies, but they must provide reasonable access
Reasonably Accessible: Covid’s Impact

• The law requires meetings to be held in places “reasonably accessible” to the members of the public and open to all citizens at all times unless otherwise provided by law. Wis. Stat. § 19.81(2).
• The type of access that constitutes reasonable access during pandemic circumstances may be different from the types of access required in other circumstances.
  • Whether a meeting is “reasonably accessible” is a factual question determined on a case-by-case basis.
• Under pandemic circumstances, governmental bodies can typically meet their open meetings law obligations while being mindful of the public health situation by conducting meetings via telephone or video conference calls.
  • However, the public must be provided an effective way to monitor the calls.
• Notices must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.
Reasonably Accessible: Covid’s Impact (cont.)

• Best practices:
  • It is advisable for bodies to keep the public health situation, government guidance, and health concerns of the public in mind when making decisions regarding conducting open meetings.
  • Bodies should be mindful that it may be burdensome, infeasible, or impossible for some members of the public to attend in person or remotely.
    • Bodies should **facilitate reasonable access** to meetings for such individuals.
      • For example, bodies could hold meetings in person with a remote option.
  • **Bottom Line:** The more access to meetings, the better. Providing multiple options—even post-pandemic—to the public to attend meetings helps to fulfill the purpose of the open meetings law.
Open Sessions: Citizen Participation

- The open meeting law ensures the right to attend and observe open session meetings.
- The law does not require a body to allow the public to speak or actively participate.
- However, the law permits a portion of an open meeting to be set aside as a public comment period.
  - Public comment periods are not required.
  - Such a period must be included on the meeting notice.
- During a public comment period, a body:
  - may receive information from the public and
  - may discuss any subject raised by the public but
  - may not take formal action.
Open Sessions: Recording

• Wis. Stat. § 19.90:
  • Bodies must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session.
  • Recording or photographing activities may not disrupt the meeting.

• The open meetings law does not require governmental bodies to permit citizens to record closed sessions.
Open Sessions: Voting

- Unless otherwise specifically provided, no secret ballots may be used except for electing officers of the body.
- Any member may require a roll-call vote.
Open Sessions: Record Keeping

- All motions and roll call votes must be recorded and preserved
  - Law does not specify a timeframe in which such records must be created.
  - However, it is advisable that motions and roll call votes should be recorded at the time of the meeting or as soon thereafter as practicable
- Voting records must be open to public inspection to the extent required under the public records law
- The open meetings law does not itself require bodies to keep formal minutes of meetings
  - However, minutes are often required by other statutes for certain types of bodies
CLOSED SESSIONS
Closed Sessions: Required Procedure

- Every meeting must begin in open session
- To go into closed session, a motion must be duly made and carried in open session
- The vote of each member must be recorded
- Before a vote to go into closed session, the presiding officer must announce:
  - The statutory exemption(s) authorizing the closed session and
  - The nature of the business to be considered
Closed Sessions: Scope and Attendance

• Limited scope
  • When a governmental body is in closed session, it must limit its discussion:
    • to the specific business for which the closed session was authorized and
    • may not take up any other matters

• Attendance
  • A body has discretion to allow anyone to attend a closed session
  • No duly elected or appointed member of a body may be excluded from any
    meeting of that body—whether closed or open
  • A member also may not be excluded from a meeting of a subunit of the body, unless the body has a rule to the contrary
Closed Sessions: Authorized Subjects

- The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).

- The following slide includes some commonly used exemptions; it is not a complete list. For a more complete discussion of this topic, see DOJ’s Wisconsin Open Meetings Law Compliance Guide.
Closed Sessions: Authorized Subjects (cont.)

(a) **Deliberating about a case** that has been the subject of a judicial or quasi-judicial trial or hearing before the body. Wis. Stat. § 19.85(1)(a).

(b) Considering **dismissal, demotion, licensing or discipline of a public employee** or the investigation of charges against the employee. Wis. Stat. § 19.85(1)(b).

(c) Considering **employment, promotion, compensation, or performance evaluation data** of a public employee. Wis. Stat. § 19.85(1)(c).

(d) Considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**. Wis. Stat. § 19.85(1)(d).

(e) Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting “other specified public business” whenever **competitive or bargaining reasons require a closed session**. Wis. Stat. § 19.85(1)(e).

(f) Considering **sensitive personal information** that would be likely to have a substantial adverse effect upon an individual’s reputation. Wis. Stat. § 19.85(1)(f).

(g) **Conferring with legal counsel** about strategy related to litigation. Wis. Stat. § 19.85(1)(g).
Closed Sessions: Voting

• Under a prior version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, if the vote is integral to the authorized subject of the closed session. *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).

• More recently, the Wisconsin Court of Appeals indicated that a body should vote in open session unless a closed vote is expressly authorized. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985).
  - The Wisconsin Court of Appeals did not discuss *Cities Service Oil Co.* and the older decision remains binding precedent.

• DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.
ENFORCEMENT
Enforcement: Options and Penalties

• The open meetings law may be enforced by the attorney general, local district attorney, or by a private relator. Wis. Stat. § 19.97:

• Penalties:
  • Civil forfeiture of $25 to $300 per violation for any member of a body who knowingly attends a meeting held in violation of the open meetings law or otherwise violates the law
  • A member is not liable for attending an unlawful meeting if the member makes or votes in favor of a motion to prevent the violation from occurring. Wis. Stat. § 19.96.
  • Members of a body who—acting openly and in good faith—seek and rely upon the advice of the body’s official legal counsel may not be found liable for any violation

• An action taken at an unlawful meeting may be voidable if:
  • the court finds that the public interest in the enforcement of the open meetings law outweighs the public interest in sustaining the validity of the action
Further Information

• Download **DOJ Compliance Guides** and other resources at [https://www.doj.state.wi.us/office-open-government/office-open-government](https://www.doj.state.wi.us/office-open-government/office-open-government)

• Contact the Office of Open Government:

  • Location: AG’s Capitol Office, 114 East
  • Main Tel: (608) 267-2220
  • OOG Email: opengov@widoj.gov

  • Paul Ferguson: (608) 264-9464
    fergusonpm@doj.state.wi.us
Thank You!